SUPREME COURT
JUN 25 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 121

NECHES RIVER CONSERVATION DISTRICT,
Petitioner,

v.

BRIGADIER GENERAL L. E. SEEMAN,
Division Engineer, Southwest Division,
Corps of Engineers, United
States Army, Et Al.,
Respondents.

Petition for Writ of Certiorari
to The United States Court of Appeals
for the Fifth Circuit

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BRIGADIER GENERAL L. E. SEEMAN, Division Engineer, Southwest Division, Corps of Engineers, United States Army, Et Al.,
Respondents.

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 13, 1958.

Citations to Opinions Below

The opinion of the District Court (R. 25-6) is unreported. The opinion of the Court of Appeals, printed in Appendix B, *post*, p. A18, is reported at 252 F. 2d 327. The opinion of the Court of Appeals in the companion case of *Anderson v. Seeman*, to

which reference was made by the Court of Appeals in the present case, is reported at 252 F. 2d 321, and is printed in Appendix B, *post*, p. A21.

Jurisdiction

The judgment of the Court of Appeals was entered on February 13, 1958. (R. 36; p. A20, *post*). Rehearing was denied on March 27, 1958. (R. 49). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether respondents are authorized to proceed with the construction of McGee Bend dam and reservoir on the Angelina River in Texas and to control thereby the waters of that intrastate stream without first obtaining a permit from the Board of Water Engineers of Texas.

2. Whether the Court of Appeals was correct in holding that paragraph (b) of the Rivers and Harbors Act of 1945 "is merely a statutory guide for the operation" of McGee Bend dam after its construction and that it is not intended thereby that Texas or its agencies determine whether such operation and maintenance conflicts with local beneficial consumptive uses.

3. Whether petitioner sufficiently alleged in its complaint such injury as would entitle it to an injunction.

4. Whether the complaint shows a sufficient right in petitioner to challenge the actions of re-

spondents as being unauthorized by the statute under which respondents are purportedly operating.

Constitutional and Statutory Provisions Involved

The following constitutional and statutory provisions are directly involved, and relevant portions are set forth *post* in Appendix A at the cited page:

1. *The Rivers and Harbors Act of 1945*, 59 Stat. 10, (page A1). In addition extracts of the critical language from the statute are reprinted at pages 8 and A25, *post*.

2. Texas Constitution, Article 16, Section 59 (page A6).

3. Article 7467, Texas Revised Civil Statutes, (page A7).

4. Article 7492, Texas Revised Civil Statutes, (page A7).

5. Article 7496, Texas Revised Civil Statutes, (page A8).

6. Article 8280-108, Texas Revised Civil Statutes, (page A10).

Statement

Petitioner Neches River Conservation District, a body politic and corporate under the laws of Texas, sued the Southwest Division Engineer, and the Fort Worth District Engineer, of the Army Corps of

Engineers, alleging that defendants were constructing a federal dam on the Angelina River at McGee Bend in Texas without complying with the terms of the Rivers and Harbors Act of 1945, under which they purported to act. (R. 7-10) The jurisdiction of the District Court was invoked because the case arises under a law of the United States and the matter in controversy exceeds the value of $3,000, exclusive of interest and costs. (R. 6)

Petitioner, seeking a permanent injunction and a declaratory judgment, asserted in its complaint that the authorizing act subordinated the federal use for navigation of the waters of the Angelina River to beneficial consumptive uses by persons and agencies deriving water rights from Texas, and that the voluntary recognition by Congress of these local uses of the waters to be impounded by defendants required defendants to proceed through the Texas Board of Water Engineers before construction of the dam. (R. 8-9) Petitioner also alleged that respondents were in the process of entering into a contract which committed these defendants over a long period of time to release specified amounts of water from the proposed reservoir at stated intervals, without any effort to coordinate these discharges with the orderly development of this watershed by authority of the Texas Board of Water Engineers, as is inferentially required by the statute under which defendants were proceeding. (R. 10-11) By an amendment to the complaint filed before any responsive pleading, petitioner asserted that defendants were proceeding with construction of the

dam without the proper, or any, permit from Texas, while petitioner possessed a "presentation," granted by the Texas Board of Water Engineers, which gave it a priority right to construct a dam of different design and purpose on the site defendants were utilizing. (R. 16-20)

Respondents filed a motion to dismiss the action (R. 21-22), which was generally granted by the District Court on February 25, 1957. (R. 23-24) The grounds of the motion were that: (1) the suit was one against the United States; (2) the Secretary of the Army was an unjoined and indispensable party; (3) the "authorized discretionary acts" of government officers could not be enjoined or declared illegal; (4) irreparable injury was not alleged; (5) the construction of the dam or the making of the contract could not be enjoined or declared illegal; and (6) petitioner failed to state a claim upon which relief could be granted.

The Court of Appeals on February 13, 1958 affirmed the order of the District Court dismissing the action (R. 36) for the reasons stated in *Anderson v. Seeman*, 252 F. 2d, 321,[1] decided the same day. Disposing of the appeal in this manner, the Court noted without considering "the other interesting and somewhat troublesome grounds for affirming . . . urged upon us by the Government, i.e. (1) The plaintiff has failed to allege such injury as would entitle it to an injunction, and (2) The complaint fails to show any right in plaintiff to assert on behalf of the State of Texas any claim that the rights

[1] For convenience the opinion of the Court below in the *Anderson* case is printed in Appendix B, *post*, pp. A21-A30.

of the State will be invaded by the proposed construction." (252 F. 2d 328; R. 35; Appendix B, *post*, p. A19)

The Texas State Board of Water Engineers, represented by the Attorney General of Texas, urged in an *amicus curiae* brief filed with the Court of Appeals that the judgment of the District Court be reversed and the cause remanded for trial. This brief was apparently filed too late for the Court of Appeals to give consideration to it before handing down its opinion; certain statements in the opinion confirm this conclusion.[2] Attention to it was invited, however, in a timely petition for rehearing which raised the questions here presented (R. 37-39), but rehearing was denied without opinion on March 27, 1958. (R. 49). Believing that the views of the Texas Attorney General, speaking on behalf of the Board of Water Engineers, are important and helpful to this Court's disposition of the case, the brief in question is reprinted herein as Appendix D, *post*, pp. A36-A46. Permission of the Attorney General of Texas to follow this course of action has been obtained.

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[2] In footnote 3 to the opinion in the *Anderson* case (reprinted at p. A27, *post*.) the Court remarked:

> "It will be noted that the Board itself is not a party to this litigation and is not seeking to establish its power of veto over the action of the United States. An interesting question not discussed by the parties and therefore not passed on by us is whether private parties in this kind of litigation have the standing to assert this point, since the right to be vindicated, if it exists at all, belongs to the State of Texas. For all that appears the State considers that the proposed construction is entirely consistent with the stated federal policy."

Reasons For Granting The Writ

1. The decision below conflicts in principle with the judicially recognized Congressional policy of leaving unimpaired by federal intervention the appropriative water systems which exist in the Western states, lying in whole or in part west of the 98th meridian. Of course, no matter how consistent Congress may have been in the application of any such policy, it may depart from it at will. But a deviation should not be inferred from language which seems plainly to be in furtherance rather than in derogation of the policy. The holding in the present case refuses to give that judicial sanction to federal recognition of state water rights which has been given in other respects in the past, and seems to have been intended here.

For example, this Court has adhered to the view that government agents acting under the Reclamation Act[3] must obtain state permits and priorities for the use of water "in the same manner as a private appropriator or an irrigation district formed under the state law." *Nebraska v. Wyoming*, 295

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[3] Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U. S. C. Sec. 383, provides:

"Nothing in [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of [this Act], shall proceed in conformity with such laws, and nothing in [this Act] shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

U. S. 40 at 43.[4] Language in other statutes[5] clearly reflects this same Congressional desire to endorse state systems of water rights which it considers neither necessary nor desirable to supplant.

Positive language in the Rivers and Harbors Act of 1945, and virtually identical language in the Flood Control Act of 1944, perpetuates the pattern of these earlier statutes. It begins by stating the policy of Congress to be:

(1) "to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control";

(2) "to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the nation's rivers";

(3) "to facilitate the consideration of projects on a basis of comprehensive and coordinated development"; and

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[4] See also *United States v. Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935); *Nebraska v. Wyoming*, 325 U. S. 589 (1944); *Mason Company v. Tax Commissioner*, 302 U. S. 186 (1937).

[5] See the Act of July 26, 1866, 14 Stat. 253, 30 U. S. C. Sec. 51; the Desert Lands Act of March 3, 1877, 19 Stat. 377, 43 U. S. C. Sec. 321 et seq.; Federal Water Power Act of June 10, 1920, 41 Stat. 1077, 16 U. S. C. Secs. 796-823; Sec. 18 of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057); Sec. 1 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 33 U. S. C. 701-1); Water Pollution Control Act of June 30, 1948, 62 Stat. 1155, 33 U. S. C. Sec. 466; the Submerged Lands Act of May 22, 1953, 67 Stat. 30, 43 U. S. C. Sec. 1311 (e).

(4) to limit the authorization and construction of navigation works to those [...] which can be operated consistently with appropriate and economic use of the waters of such rivers by other users." (Act of March 2, 1945, 59 Stat. 10; Appendix A, *post*, p. A1.)

It then sets about to satisfy its expressed desires by providing, first, in section (a) that *in the future* reports recommending construction of navigation or flood control projects would not be submitted to Congress unless they had been forwarded through a specific procedure which would insure that the views of the States concerned had been secured and recorded.[6] Second, in section (b), which applied to works "herein authorized", it was provided that the "use for navigation . . . shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

What lies behind these provisions? We know that Congress in 1944 and 1945 was considering flood control and navigation projects for the first time in several years. The Flood Control Act of 1937[7] had authorized numerous investigations, and action on the many resulting reports had been postponed by the war. The landmark 1936 act had itself re-

[6] Texas thereafter passed a statute, Article 7472e, establishing a procedure for communicating its views to the federal authorities so far as future reports were concerned.

[7] 49 Stat. 1570, 33 U. S. C. Sec. 701a.

cited that flood control in navigable waters "is a proper activity of the Federal Government *in cooperation with* states, their political subdivisions, and localities thereof." This mild language, which speaks only in terms of cooperation, was interpreted by a state court as requiring the local officers of the Corps of Engineers to obtain a permit from the appropriate state agency before constructing a flood control project which was authorized by the 1936 Act.*

The language in the 1945 Act to which reference has been made is derived from the "O'Mahoney Amendment" to both the Flood Control Bill (H. R. 4485) and the Rivers and Harbors Bill (H. R. 3961) which were introduced in the Second Session of the 78th Congress. After much controversy the "O'-Mahoney Amendment" in a modified form became a part of both the Flood Control Act of 1944, 58 Stat. 887, and the Rivers and Harbors Act of 1945, 59 Stat. 10. The language is carried as 33 U. S. C. Sec. 701a. Two brief extracts from the legislative history of the amendment are printed herein as Appendix C. The proponents of the measure sought quite openly to soften the full impact of the commerce power on the state systems of water rights. They recognized that the Constitution gave the Congress the power to sweep out of the nation's streams any log-jam of state-created water rights or riparian property rights which interfered with the proper exercise of the navigation servitude. But they argued that Congress should so use the power

* *Lyman Flood Prevention Assn. v. City of Topeka*, 152 Kan. 484, 106 P. 2d 117 (1940).

over navigation as to save and adopt state systems of water distribution which it desired to preserve. Whether these intentions were effectively carried forward into the words of the statute is the question in this case.

Texas' system of water rights is constructed, so far as flowing streams are concerned, around a framework of permissive appropriations of water from those streams. Any person, political subdivision or "agency of the State or of the United States" must obtain a permit from the Texas Board of Water Engineers *before* beginning construction of the improvement or facility to be used for the taking, storage or diversion of the water. Article 7492, Texas Civil Statutes, p. A7, *post*. A priority right to a permit to appropriate water at a given site arises upon approval by the Board of a "presentation" describing the extent and purpose of the contemplated appropriation. Article 7496, Texas Civil Statutes, p. A8, *post*.

In addition, the "control, storing, preservation and distribution" of the waters of Texas "for all useful purposes" have been declared "public rights and duties" by a specific amendment to the Texas Constitution. Article 16, Section 59, p. A6, *post*. This amendment authorized the creation of "conservation and reclamation districts" to be vested with governmental powers appropriate to the discharge of these duties. Petitioner is such a district, created by the Texas Legislature, and vested with broad powers over the watershed of the Neches and Angelina Rivers. See Article 8280-108, Texas Civil Stat-

utes, p. A10, *post*. Its actions must be integrated into the state system, and coordinated with other appropriations on the stream, through compliance with the permit-presentation procedure supervised by the Board of Water Engineers. See Article 8280-108, *supra*, sec. 14(q), p. A16, *post*.

Petitioner asserts that *if* Congress meant "to recognize the interests and rights of the States," "to preserve and protect . . . established and potential uses," "to limit the authorization and construction of navigation works to those . . . which can be operated consistently with . . . use of the waters . . . by other users," and to limit the use for navigation to "only such use as does not conflict with any beneficial consumptive use, present or future" in western states, as it said it did, *then* it intended its agents to comply in Texas with the requirements of permissive appropriations. How else could its goals be achieved?

The decision of the Court of Appeals is not based on the theory that compliance with Texas law is unnecessary in order to give effect to Congress' intention. Rather it proceeds on the premise, sufficiently rebutted herein by the plain evidence of Congressional dissatisfaction with the reports it had before it, that Congress *itself* determined that the dam at McGee Bend fit its policies. Review of this decision is sought not merely because it is thought to be wrong, but because it thwarts a plain purpose of Congress. If the Court of Appeals is correct, then Congress' policy declaration fails of effect and be-

comes no more than a pious utterance. Necessarily, if the Court of Appeals is correct, the language of subsection (b) concerning the use of the project for navigation becomes no more than a "statutory guide" to the unfettered judgment of the operators of the dam. Indeed, the Court of Appeals, in its opinion, stated this to be the case. 252 F. 2d at 325; *post*, p. A29.

This decision, right or wrong, is in conflict with at least the basis of other federal decisions giving effect to Congressional sanction of state interests, and involves an important question of federal law which should be settled by this Court.

2. The question of whether a non-permissive federal dam is to be super-imposed on the state system of appropriations in effect on the Angelina River is of crucial importance, not only to plaintiff, but to all permissive appropriators on the stream. The Board of Water Engineers has stated that the decision will have "tremendous impact" on its own duties. Appendix D, *post*, p. A37. The importance of the decision of this issue to the respondent officers is apparent.

The project itself is presently estimated to cost in excess of $50,000,000.00. Other projects in western states were authorized in the 1945 Act, and subsequent statutes have contained the same language. Congress itself has been continually concerned with the issue of federal recognition of state water rights and the effect of the language it has used in this respect in the past.

The full extent to which Congress intended state law to govern under the Reclamation Act is presently being measured by the Court in *Ivanhoe Irrigation District v. All Parties* (No. 122) and its companion cases (123, 124 and 125, October Term 1957). A different aspect of the same basic issue is present here.

Thus this case does not present an issue of isolated importance, but rather one of the inter-relation of state and federal governments. The decision of Congress to endorse state water rights systems was made in the exercise of its admitted authority over commerce and navigation. But just as Congress may sweep these state interests aside, so it may adopt them as its own. Whether it has chosen to save these interests in a given case is a question of as much importance as whether it has chosen to override them.

3. Rather than presenting a complicated procedural point which dilutes the importance of this case, the matter of plaintiff's "standing" enhances it. The creation of such districts as plaintiff is authorized by constitutional provision (Article 16, Section 59, *post*, p. A6), and plaintiff itself was created by the Texas Legislature (Article 8280-108, *post*, p. A10.) It is vested with the express and implied powers accorded to such districts by the State Constitution and by general law, and in addition is granted, in some sixteen subparagraphs to Section 14 of its creating act (set forth at page A11, *post*), specific powers of a detailed and extensive nature.

The Attorney General of Texas, in his *amicus curiae* brief before the Court of Appeals, states unequivocally that "the Neches River Conservation District, possessing both sovereign powers under the legislative act creating the district and proprietary interests under its presentation on file with the Board, is fully capable of litigating this important question alone. . . ." (Appendix D, page A37, *post*). Such a well-supported endorsement removes any serious question of plaintiff's authority under state law to raise this matter, and is a sufficient assurance that its action in doing so does not run counter to any superior state policy. It leaves open only the important issue of whether the language in the 1945 Rivers and Harbors Act was intended for the benefit of Texas' agencies having authority to exercise its sovereign powers or only for Texas itself.

The language of the act indicates strongly that plaintiff is included within the ambit of recognition. Texas has determined, to develop its watersheds partly through the use of conservation districts, and the policy of Congress is stated to be "to recognize the interests and rights of the States in determining the development of the watersheds within their borders." If only the State itself, or only the coordinating agency (the Board of Water Engineers) is free to challenge the actions of federal officers as being in violation of a federal statute recognizing the power of the State to determine its own means of watershed development, then the power of the State to delegate responsibilities and powers to its subordinates has been abridged by the very fed-

eral statute which sought to endorse that power. States operate more and more through political subdivisions and public corporations; a decision that these agencies cannot assert, within their special sphere, privileges which have been accorded generally to the State would decrease their utility substantially.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari has been served upon Respondents by depositing the same in a United States post office, with first class air mail postage prepaid, addressed to each of the counsel of record for respondents, namely, Messrs. Perry W. Morton, Assistant Attorney General, David R. Warner, Alfred H. O. Boudreau, Jr., Department of Justice, Washington, D. C., Heard L. Floore, United States Attorney, Forth Worth, Texas; and a copy to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

Ireland Graves
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Counsel for Petitioner

APPENDIX A

1. **Rivers and Harbors Act of 1945, 59 Stat. 10, 79th Congress, 1st Session, March 2, 1945, Chapter 19—Public Law 14 [S. 35].**

An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

"In conformity with this policy—

"(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term 'affected State or States' shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and

such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal

and its attachment shall be printed as a House or Senate document.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial pur poses.

"(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), amended, are hereby amended accordingly.

"Sec. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That no project herein authorized shall be appropriated for or constructed until six months after the termination of the present wars in which the United States is engaged unless the construction of such project has been recommended by an authorized defense agency and approved by the President as being necessary or desirable in the interest of the national defense and security, and the President has notified the Congress to that effect: *Provided further*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission, and such recommendations shall be based upon consideration of the proper utilization and conservation in the public interest of the resources of the region:

" * * * * * *

"Neches and Angelina Rivers, Texas, Senate Document Numbered 98, Seventy-sixth Congress; [59 Stat. 18]

" * * * * * * "

2. Texas Constitution, Article 16, Section 59, Conservation and Reclamation:

(a) The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary . . . .

Added Aug. 21, 1917, proclamation Oct. 2, 1917.

3. Art. 7467, Vernon's Annotated Texas Statutes, Property of the State:

The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter. When an application is made for appropriation of such water for mining purposes, the owner of the land through which the water flows and which is to be appropriated shall have the prior right to appropriate same, and shall be permitted to exercise such right, although such owner may not have made application prior to such application by another, and such owner shall have only ten days after notice of application to appropriate such water in which to exercise his prior right to appropriate, which he shall do by written application filed with the Board of Water Engineers within such time. Acts 1921, p. 233, sec. 2.

4. Art. 7492, Vernon's Annotated Texas Statutes, Application for Permit:

Every person, association of persons, public or private corporation, political subdivision of the State, agency of the State or of the United States,

who shall, after this Act shall take effect, desire to acquire the right to appropriate, for the purposes stated in this Chapter, unappropriated water of the State, shall, before commencing the construction, enlargement or extension of any dam, lake, reservoir or other storage work, or any ditch, canal, intake, headgate, pumping plant or other distributing works, or performing any work in connection with the storage, taking or diversion of water, make an application in writing to the Board for a permit to make such appropriation, storage or diversion. Acts 1917, p. 214, part § 15; Acts 1953, 53rd Leg., p. 878, ch. 358, § 1.

5. **Art. 7496, Vernon's Annotated Texas Statutes, Presentation:**

Any person who desires to investigate the feasibility of any water appropriation or use of water in quantities greater than twelve thousand-acre feet storage or fifty second feet diversion, or for generaiton of two thousand hydro-electric horsepower and who has an organized engineering force adequate to expeditiously proceed with such investigation, shall, upon the filing of an application therefor presenting such facts duly verified to the board, have priority date from the time of filing such application should a permit thereafter be granted thereon. Such application to the requirements above stated, shall describe the contemplated project, its location and purpose, the quantity of water to be applied for by measure if known, and if not by statement as near as possible of the quantity of water necessary to the contemplated use.

Before such presentation is filed same shall be presented to said board for examination.

Such presentation shall not be filed unless first approved by the board as to extent and purpose, and the board may require, in addition to the requirements above specified, additional information to be submitted under oath in order to determine if same is filed in good faith for the purpose stated.

A presentation is confined to a stated purpose and area and one reservoir of diversion site, and cannot be so filed as to cover more than a reasonable area.

The presentation when approved and filed by the board and to the extent approved by the board shall be in effect for a period of six months from the date it is so filed by the board.

If a person filing a presentation shall, during such period, have begun work and shall have prosecuted same with reasonable diligence, but requires more time than the six months period to complete same, then application may be made before the expiration of said period to the board for an extension of time thereon. Such application for the extension of time shall contain a statement of the work done and the reasons why more time is required therefor. The board shall consider same together with any opposition thereto filed, and may grant one or more extensions of time, provided the total time granted under a presentation shall not exceed a term of three years from the date same is first filed. Acts 1917, 35th Leg., p. 215. ch. 88 § 16; Acts 1925, 39th Leg., p. 341, ch. 136, § 2.

6. Art. 8280—108, Vernon's Annotated Texas Statutes, Neches River Conservation District.

Section 1. There shall be and is hereby created a conservation and reclamation district by the name of "Sabine-Neches Conservation District [now Neches River Conservation District]," which district is created as a governmental agency, body politic and corporate, vested with all the authority as such under the Constitution and Laws of the State; and which shall have and be recognized to exercise all of the powers of such governmental agency and body politic and corporate as are expressly authorized in the provisions of the Constitution, Section 59 of Article 16, for districts created to conserve, store, control, preserve, utilize and distribute the storm and flood waters and the waters of the rivers and streams of the State, and such powers as may be contemplated and implied by the purposes of this provision of the Constitution, and as may be conferred by General Law, as well as by the provisions of this Act, except nothing herein contained shall authorize said district to levy any taxes or special assessments, or to create any debt payable out of taxation; and said district shall have and be recognized to exercise all the rights and powers of an independent governmental agency, body politic and corporate, to construct, maintain and operate, in the valleys of the Sabine and Neches Rivers and their tributaries, within or without the boundaries of such district, any and all works deemed essential to the operation of the district and for its administration in the control, storing, preservation and distribution to all useful purposes of the waters of the Sabine and

Neches Rivers and their tributary streams, including the storm and flood waters thereof; and such district shall have and be recognized to exercise such authority and power of control and regulation over such waters of the Sabine and Neches Rivers and their tributaries as may be exercised by the State of Texas, subject to the provisions of the Constitution and the Acts of the Legislature.

* * * * *

Sec. 3. The territory which shall be embraced within the boundaries of said Sabine-Neches Conservation District [now Neches River Conservation District] shall be all of that territory which is situated within the watershed of the Neches River and its tributaries as the same is made certain by the State contour maps now on file in the office of the Board of Water Engineers of the State of Texas to which maps reference is hereby made thereof. Upon the request of the Board of Directors of the Neches River Conservation District the Board of Water Engineers shall define such boundaries so that the same may be expressed in written calls of the metes and bounds of said watershed; provided, however, that the definition of such boundaries shall not be a condition precedent to the exercise of any power conferred by the Act creating said Neches River Conservation District.

* * * * *

Sec. 14. The said district shall have and be recognized to exercise, in addition to all the hereinbefore mentioned powers, for the conservation and

beneficial utilization of said waters, the power of control and employment of such waters of the Sabine and Neches Rivers and their tributaries, including the storm and flood waters thereof, in the manner and for the particular purposes hereinafter set forth:

(a) To provide through practical and legal means for the control and coordination of the regulation of the waters of the Sabine and Neches Rivers and their tributary streams.

(b) To provide by adquate organization and administration for the preservation of the equitable rights of the people of the different sections of the watershed area, in the beneficial use of the waters of the Sabine and Neches Rivers and their tributary streams.

(c) For storing, controlling and conserving the waters of the Sabine and Neches Rivers and their tributaries within and/or without such district, and the prevention of the escape of any of such waters without the maximum of public service; for the prevention of devastation of lands from recurrent overflows, and the protection of life and property in such district from uncontrolled flood waters.

(d) For the conservation of the waters of the Sabine and Neches Rivers and their tributaries essential for the domestic uses of the people of the district, including all necessary water supplies for cities and towns.

(e) For the irrigation of all lands in said district, and/or lands without said district but within said watershed area where irrigation is required

for agricultural purposes, or many be deemed helpful to more profitable agricultural production; and for the equitable distribution of said waters to the regional potential requirements for all uses, domestic, manufacturing and irrigation. All plans and all works provided by said district, and as well, all works which may be provided under authority of said district, shall have primary regard to the necessary and potential needs for water, by or within the area in such district constituting the watershed of the Sabine and Neches Rivers and their tributary streams.

(f) For the better encouragement and development of drainage systems and provisions for drainage of lands in the valleys of the Sabine and Neches Rivers and their tributary streams needing drainage for profitable agricultural production; and drainage for other lands in the watershed area of the district requiring drainage for the most advantageous use.

(g) For the purpose of encouraging the conservation of all soils against destructive erosion and thereby preventing the increased flood menace incident thereto.

(h) To control and make available for employment said waters in the development of commercial and industrial enterprises in all sections of the watershed area of the district.

(i) For the control, storing and employment of said waters in the development and distribution of hydroelectric power, where such use may be economically coordinated with other and superior uses,

and subordinated to the uses declared by law to be superior.

(j) And for each and every purpose for which flood and storm waters when controlled and conserved may be utilized in the performance of a useful service as contemplated and authorized by the provisions of the Constitution and the public policy therein declared.

(k) To purchase and/or construct all works necessary or convenient for the exercise of the powers, and to accomplish the purposes specified in this Act, and to purchase or otherwise acquire all lands and/or other property necessary or convenient for carrying out any such purposes.

(l) The right of eminent domain is expressly conferred upon such district to enable it to acquire the fee simple title to, and/or easement or right-of-way over and through, any and all lands, water or lands under water, private or public, within and without such district, necessary or convenient to carry out any of the purposes and powers conferred upon such district by this Act. All such condemnation proceedings shall be under the direction of the directors and in the name of the district, and the assessment of damages and all procedure with reference to condemnation, appeal and payment shall be in conformity with the statutes of this State as provided in the title of the Revised Statutes relating to "Eminent Domain."

(m) The Board of Directors of said district shall prescribe fees and charges to be collected for the use of water, water connections or other service,

which fees and charges shall be reasonable and equitable and fully sufficient to produce revenue adequate to pay, and said Board of Directors shall cause to be paid therefrom:

* * * * *

(n) Such district through its Board of Directors shall have the right to employ managers, engineers, attorneys, and all necessary employees to properly construct, operate and maintain said works and carry out the provisions of this Act, and to pay reasonable compensation fixed by the Board of Directors for such services.

(o) Such district, in addition to the powers hereinabove set out, shall have general power and authority to make and to enter into all contracts, leases and agreements necessary or convenient to carry out any of the powers granted in this Act, which contracts, leases and agreements may be entered into with any person, real or artificial, any corporation, municipal, public or private, and/or any government or governmental agency, including the United States Government and the State of Texas, and may convey, or cause to be conveyed any of its properties, rights, lands, tenements, easements, improvements, reservoirs, dams, canals, plants, laterals, works and facilities to the United States Government or any agency thereof, or may enter into a lease with the United States Government, or any agency thereof relative thereto, and obligate itself to pay rental therefor out of the income and revenues thereof, with or without the privilege of purchase, provided, however, that

nothing herein contained shall authorize the assumption by such district of any obligation requiring payment out of taxes. Any and all such contracts, leases and agreements herein authorized shall be approved by resolution of the Board of Directors of such district, and shall be executed by the President and attested by the Secretary thereof.

(p) Such district shall have the right to sue and be sued.

(q) Before such district shall establish a diversion point, construct the canals, pumping plant and other works herein provided for, it shall present to the Board of Water Engineers of the State of Texas, or such other agency performing the functions now performed by the Board of Water Engineers, plans and specifications of the same and obtain approval of such Board.

Sec. 15. The power and duties herein devolved upon the said district shall be subject to the continuing rights of supervision by the State, which shall be exercised through the State Board of Water Engineers, and in appropriate instances by the State Reclamation Engineer, each of which agencies shall be charged with the authority and duty to approve, or to refuse to approve, the adequacy of any plan or plans for flood control or conservation improvement purposes devised by the district for the achievement of the plans and purposes intended in the creation of the district, and which plans contemplate improvements supervised by the respective State authority under the provisions of the General Law.

Sec. 16. Said district shall have and may exercise such functions, powers, authority, rights and duties as may permit the accomplishment of the purposes for which it is created, including investigating and planning, acquiring, constructing, maintaining and operating of all necessary properties, lands, rights, tenements, easements, improvements, reservoirs, dams, canals, laterals, plants, works and facilities which it may deem necessary or proper for the accomplishment of said purposes including the acquisition within and/or without said district of lands, right-of-way, water rights and all other properties, tenements, easements and all other rights incident, helpful to or in aid of carrying out the purposes of said district as herein defined; and this Act, in all of its terms and provisions shall be liberally construed to effectuate each and all of the purposes thereof.

* * * * *

Acts 1935, 44th Leg., p. 237, ch. 97; as amended Acts 1949, 51st Leg., p. 193, ch. 110, sec. 29.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16661

NECHES RIVER CONSERVATION DISTRICT,
Appellant,

versus

BRIGADIER GENERAL L. E. SEEMAN, Division Engineer, Southwest Division, Corps of Engineers, United States Army; and COLONEL HARRY O. FISCHER, District Engineer, Fort Worth District, Corps of Engineers, United States Army,
Appellees.

Appeal from the United States Disrtict Court for the Northern District of Texas.

(February 13, 1958)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and HANNAY, District Judge.

TUTTLE, Circuit Judge: This is an appeal from an order of the trial court dismissing a suit by the appellant seeking to enjoin the building of a dam and reservoir on the Angelina River in Texas, and is a

companion case with *Anderson, et al, v. Seeman, et al*, decided this day.

The appellant, plaintiff below, not attacking the constitutionality of the Rivers and Harbors Act of 1945 as it related to this particlar dam, charges only that that Act, correctly construed, forbids the United States Government to build the dam without first obtaining permission from the Texas Board of Water Engineers.

We have dealt fully with this contention also made by the individual landowners who were the plaintiffs in the companion suit. Having determined that issue against the contention of the appellant here, we need not consider the other interesting and somewhat troublesome grounds for affirming the judgment of the trial court urged upon us by the Government, i.e. (1) The plaintiff has failed to allege such injury as would entitle it to an injunction, and (2) The complaint fails to show any right in plaintiff to assert on behalf of the State of Texas any claim that the rights of the State will be invaded by the proposed construction.

Deciding, as we do, that the law authorizing the construction of this dam cannot be construed as requiring the permission of the State before it is built, we must agree with the trial court that the complaint fails to assert a claim on which relief could be granted.

The judgment is AFFIRMED.

JUDGMENT

Extract from the Minutes of February 13, 1958.

NECHES RIVER CONSERVATION DISTRICT,

No. 16661. versus

BRIGADIER GENERAL L. E. SEEMAN, Division Engineer, Southwest Division, Corps of Engineers, United States Army; and COLONEL HARRY O. FISCHER, District Engineer, Fort Worth District, Corps of Engineers, United States Army.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16799

R. P. ANDERSON, ET AL,
Appellants,
versus
BRIGADIER GENERAL L. E. SEEMAN, Division Engineer, Southwest Division, Corps of Engineers, United States Army, Et Al,
Appellees.

Appeal from the United States Disrtict Court for the Northern District of Texas.

(February 13, 1958.)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and HANNAY, District Judge.

TUTTLE, Circuit Judge: This is an appeal from a judgment of the trial court dismissing on motion of

the appellees this suit to enjoin the taking of appellants' lands for the building of a dam and reservoir on the Angelina River in Texas.

The complaint was filed by a number of plaintiffs whose land would be inundated by the construction of McGee Bend Reservoir. Their complaint is twofold: first, that the construction of this dam cannot legally proceed unless permission is obtained from the Board of Water Engineers of the State of Texas, which has not been done, and, second, that the lands of the complainants are in the upper limits of the contours which are included in the planned reservoir, that the "top segment" of the dam, and thus of the reservoir, is "to be added for the sole purpose of generating hydroelectric power," which is not a purpose for which Congress can constitutionally legislate, and that the law authorizing the condemnation is as to their lands unconstitutional.

It is not disputed that the Neches River, of which the Angelina is an important tributary, is a navigable river; for the purposes of the motion to dismiss it must be taken as true that the defendants, Division Engineer and District Engineer, United States Corps of Engineers, will, unless enjoined, condemn and take plaintiffs' lands.

Although the goverment asserts that the judgment of the trial court must be affirmed because (1) this is a suit against the United States which has not waived its immunity, and (2) being a suit against the United States, the Secretary of the Army is an indispensable party, we cannot pass on these questions in limine. This is so because the government's reliance on these grounds is based on its argument that

unless the statute authorizing the actions of the defendant is unconstitutional, or unless the officers' action is in excess of their statutory authority, then this is a suit against the United States.[1] In order to ascertain whether this is a suit against the United States, then we must go to the merits of the issue, i. e., is the threatened action either based on an unconstitutional statute or is it beyond the authority of a valid statute? Once we have decided that issue then the other questions become immaterial, for if we find the actions unauthorized, then by the Government's own definition this is not a suit against the Government, and if, to the contrary, we find the actions are neither unconstitutional nor beyond the statute, then the appellants lose on the merits. Since the complaint charged that the statute was unconstitutional and in the alternative that the actions of the defendants exceeded the statutory authority, the district court had jurisdiction of the suit.[2]

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[1] In its brief the Government says:

"Where suit is brought against government officers in their representative capacities, as here, the suit is one clearly against the United States unless the action of which complaint is made is in excess of the officers' statutory authority or unless it is taken under the authority of a statute which is unconstitutional. Larson v. Domestic and Foreign Commerce Corp. (1939), 337 U.S. 682 at 690."

[2] In State of Oklahoma v. Atkinson Co., 313 U.S. 508, the complaint was against a contractor and government lawyers engaged in condemnation proceedings. The three-judge district court specifically ruled that this was an appropriate method of trying out the issue of constitutionality of the statute and also its proper construction. 37 F. Supp. 93, 96. This judgment was affirmed by the Supreme Court without comment on this feature of the case. See also Colorado v. Toll, 268 U.S. 228, 230.

The complaint here pleads the Rivers and Harbors Act of 1945, 59 Stat. 10. Sec. 2 of the Act provides in part:

> "The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of National Security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, *in accordance with the plans in* the respective reports hereinafter designated and subject *to the conditions set forth therein:*
>
> . . . .
>
> "Neches and Angelina Rivers, Texas; *Senate Document numbered 98*, Seventy-sixth Congress;" (Emphasis here and hereafter in quoted material supplied.)

The plans, in accordance with which the adoption of this project was made by Congress are set out in Senate Document 98, which will be discussed below. In any event, it is clear that in construing the law and its scope both the text of the Act and the statement of purpose in the Senate Document are to be considered.

A further provision of the Rivers and Harbors Act upon which appellants rely is that which declares the policy of Congress to recognize the interests and

rights of the state in water utilization and control. Relevant parts of this declaration of policy are:

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> "In conformity with this policy—
>
> "(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control *not heretofore or herein authorized*, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a).
>
> . . . .
>
> "(b) *The use for navigation*, in connection with the operation and maintenance

of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian *shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States* lying wholly or partly west of the ninety-eighth meridian, *of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.*"

Dealing then with the first contention of complainants we restate it to be: Texas has a Board of Water Engineers whose approval is required bfore any person or agency, including, according to the state statute, the United States, can commence the construction of a dam or reservoir on the rivers of the state; the Rivers and Harbors Act of 1945 shows on its face that the approval of the Neches River and Angelina River projects was made expressly subject to the right of veto by the State of Texas. This argument depends (1) on the general statement of policy in the preamble to the statute quoted above, and (2) on the specific provisions in paragraph (b) which is also reproduced in full above. Texas is a state "lying wholly or partly west of the ninety-eighth meridian." Appellants do not take the position, so far as this contention is concerned, that Congress did not have the *power* to authorize the dam and reservoir without the state's consent, but they say that Congress intended not to do so.

We think the language of the Rivers and Harbors Act is not susceptible of the construction that before the building of the dam the United States must seek

and obtain permission from the Texas Board of Water Engineers.[3]

This act of Congress specifically authorizes the construction of the dam in question without any expressed liimtations. On the face of the matter, then, it would seem quite unlikely that the act could be construed as to make possible any requirement that before it was constructed permission of the State of Texas must be obtained. Moreover, the policy statement relied on by appellants as expressing the limitations, shows exactly how it is to be made effective. The statement of policy is followed by this language:

> "In conformity with this policy—
>
> "(a) Plans, proposals or reports of the Chief of Engineers, War Department, for any works of improvement *for navigation or flood control not* heretofore or *herein authorized*, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a) . . . ."

(Then follow detailed provisions for submitting proposals to the states with opportunity to make known the state's views. Nothing is stated that per-

[3] It will be noted that the Board itself is not a party to this litigation and is not seeking to establish its power of veto over the action of the United States. An interesting question not discussed by the parties and therefore not passed on by us is whether private parties in this kind of litigation have the standing to assert this point, since the right to be vindicated, if it exists at all, belongs to the State of Texas. For all that appears the State considers that the proposed construction is entirely consistent with the stated federal policy.

mits the conclusion that even as to future projects a final disagreement with a state shall stand as a veto of the project.)

> "(b) The use for *navigation*, [note paragraph (a) refers to works of improvement for *navigation or flood control*] *in connection with the operation and maintenance* of such works herein authorized for coonstruction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes."

It is from this statement of policy and the statement of implementation in (b) that appellants spell out an intent by Congress to require the Chief of Engineers to withhold the construction of the dam and reservoir until permission could be obtained from the Texas Board of Water Engineers; and this is in spite of the following language of the Act:

> "The following works [including the one in question] . . . shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers . . . ."

(Followed by a restriction delaying all projects until six months following termination of the war.)

Bearing in mind, as we must, that the authorization of this dam followed years of study and planning, which finally resulted in a report recommending construction, which report was itself made a part of the statute by reference (Senate Document No. 98) it becomes plain that Congress considered that as to the project "herein authorized" due recognition had already been given to the policy of cooperation with the states, and no further restraints were to be placed as to these projects except such as were there specifically included in the Act itself. The only one applicable here was paragraph (b) above.

The restrictions contained in paragraph (b) obviously are not directed to the *construction* of the works in the western states. In fact it refers to them as "work herein authorized for construction." These restraints related only to "operation and maintenance" of the work *after construction*. That this is so seems so apparent that it hardly seems necessary to add the further comment that it is only the "use for *navigation*" in the management and control of the dam and reservoir that is stated to be in some respects made subject to local uses. Even this provision may not be taken to mean that determination whether such management and control is in conformity with the stated purposes is for the state to decide. It is merely a statutory guide for the operation of the facility by the Government after construction. While it must be recognized that Congress can and occasionally does condition its own acts on cooperation with, or subject to the rights of, state governments, *United States v. Gerlach Livestock Co.*, 359 U. S. 725, we

find nothing in the Rivers and Harbors Act of 1945 thus limiting the authorization for construction of this dam and reservoir.

* * * * *

[The portion of the opinion dealing with the constitutional issue is omitted. The entire opinion is printed in appendix B to companion (Anderson) petition for a writ of certiorari].

We hold that the projected dam was authorized by the Rivers and Harbors Act of 1945 without the necessity of obtaining permission for its construction from the Texas Board of Water Engineers, and that the dam and reservoir, as authorized by Congress, was not beyond the Congressional power to build.

The judgment is AFFIRMED.

APPENDIX C

1. Extract from discussion occurring in the House of Representatives meeting as a Committee of the Whole House to consider S. B. 25, The Rivers and Harbors Bill of 1945:

"Mr. JOHNSON of California. In the first section of the bill starting on line 6 is the following language:

'It is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.'

"What is the chairman's version of the meaning of that language?

"Mr. MANSFIELD of Texas. If the gentleman remembers, we have had great controversies over many Senators' contending for States' rights on these things, insofar as it is consistent with public policy. Of course, navigation on an interstate stream cannot be brought down to a State proposition entirely. But this is to recognize the States' interest insofar as it may be consistent with the purposes of the improvement.

"Mr. JOHNSON of California. I want to ask this specific question. What is the version of the chairman as to intrastate streams like the Sacramento River which is entirely in one State, and the San Joaquin River which is entirely in one State? Does that recognize the paramount right of the State to use the water for irrigation, for instance?

"Mr. MANSFIELD of Texas. Yes, sir.

"Mr. JOHNSON of California. And for hydroelectric development?

"Mr. MANSFIELD of Texas. Yes, sir; for all domestic consumption purposes. That is the way I understand it. It is the way I understand the agreement between the engineers and the reclamation authorities. May I inquire of the gentleman from Iowa if that was not his understanding of it?

"Mr. JENSEN. That is as I understand it.

"Mr. MANSFIELD of Texas. Yes.

"Mr. DONDERO [of Michigan]. Mr. Chairman, I yield myself 3 minutes.

"Mr. Chairman, I simply rise to reiterate and confirm everything the chairman of our committee has said. I made a speech on this bill yesterday appealing to my colleagues to support it and pass it without amendment, because this bill has already passed the Senate, and both the House and Senate have agreed upon the projects which it contains. . . ." (Congressional Record, Vol. 91, Part 1, p. 1375, 79th Cong., 1945).

2. Extract from Senate Report 903, Part 2, 78th Congress, Second Session, dealing with the "O'Mahoney Amendment" to the proposed Rivers and Harbors Bill (H. R. 3961).

"In a leading case dealing with this subject, *U. S. v. Rio Grande Dam and Irrigation Company*, (174 U. S. 690), the United States Supreme Court held that, although the right of changing the common-law rule as to the use of the waters of streams within its borders belonged to a State, yet this right is limited by the superior power of the Federal Goverment to provide for the navigability of all streams within the United States. This broad power would

apply to strike down any appropriation of water for other purposes under State law which might be needed to maintain navigability of a river to the full extent declared by Congress to be necessary in a particular instance.

"The recent New River and Red River decisions (*U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377 and *Oklahoma v. Atkinson*, 313 U. S. 508), announced by the Supreme Court, hold:

(1) That the navigability of a river is a factual question, but in determining its navigable character, the feasibility of such use after reasonable improvements may properly be considered.

(2) That Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portion; and that such control extends to its tributaries (Red River).

(3) That it is for Congress alone to decide whether a particular project, by itself or as part of a comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant its authorization and construction. Such power, the Supreme Court states, is so unfettered that the judgment of Congress is conclusive (Red River).

"It is this exercise of Federal jurisdiction over non-navigable portions of a river and over its non-navigable tributaries by the mere exercise of the commerce clause which threatens irrigation uses in the upper basins. Rights established to the use of water for irrigation or other beneficial purposes, whether under State or other law, have but little stability in the face of the ever-present preferential right and demand for navigation. Congress, and

Congress alone, under these decisions, can and should remove the threat.

"Any use of the commerce clause which might retard or defeat the development of a dominant natural resource of a river basin, such as land by irrigation, should not be tolerated. Any improvement of navigation authorized by Congress which would result in depriving any State of the flow of the waters required to maintain and advance its agricultural economy should be authorized only subject to provisions adequate to protection of the use of the waters in that State for that purpose. Congress, therefore, in authorizing improvements affecting the navigability of a river system, in consideration of national and local interests, should protect interstate waters for the most beneficial uses. This means an apportionment between conflicting uses, a recognition of local and State plans with respect to the resources of a river basin, and the recognition of rights established under law as to the uses of waters for beneficial consumptive purposes.

"The commerce clause of the Federal Constitution (Art. 1, Sec. 8(3)) provides that Congress shall have power "to regulate commerce with foreign nations and among the several States * *." It was held earlier in our history that the power to regulate commerce necessarily included power over navigation. The right to regulate carries with it the right to restrict. The clause is not self-executing. Resort to this clause in aid of navigation is no more appropriate than reliance upon it to prescribe limitations on navigation. This constitutional provision clothes Congress with a power to regulate commerce. Clearly, the Congress may direct the extent to which its power is to be exercised within the field of Federal jurisdiction under this provision. Certainly, for ex-

ample, it may prescribe that the power shall not be exercised to the detriment of local and State interests or of rights to use of water for beneficial consumptive purposes, under whatever law those rights might be asserted. Any other exercise of this broad power should be tempered with great caution, reason, and justice when the welfare of a large part of the Nation is involved. It is this regulation and limitation in the interest of the welfare of a large section of the Nation which is provided by the O'Mahoney amendment." S. R. 903, Pt. 2, p. 12, 78th Congress 2d Session.

APPENDIX D

IN THE

United States Court of Appeals

FIFTH CIRCUIT

No. 16,661

NECHES RIVER CONSERVATION DISTRICT,
Appellant,

vs.

BRIGADIER GENERAL L. E. SEEMAN
Division Engineer, Southwest Division,
Corps of Engineers, United States Army;
and

COLONEL HARRY O. FISHER,
District Engineer, Fort Worth District,
Corps of Engineers, United States Army,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

BRIEF FOR THE TEXAS STATE BOARD OF WATER ENGINEERS, AMICUS CURIAE

INTRODUCTION

The question before the Court in this case is whether the River and Harbors Act of 1945 author-

ized the defendants to construct McGee Bend Dam on the Angelina River without first obtaining a permit from the Texas State Board of Water Engineers. The interest of the Board in this question is apparent, and though the Neches River Conservation District, possessing both sovereign powers under the legislative act creating the district and proprietary interests under its presentation on file with the Board, is fully capable of litigating this important question alone, the tremendous impact the Court's determination will have on the duties of the State Board of Water Engineers with respect to water resources planning and development in Texas has prompted this expression, amicus curiae, of the views of the Board.

ARGUMENT

The Rivers and Harbors Act of 1945 requires the defendants to obtain a permit from the Texas State Board of Water Engineers before commencing the construction of McGee Bend Dam.

The problem here is purely one of interpretation of the Rivers and Harbors Act of 1945. In this Act, Congress authorized the construction of a number of Federal rivers and harbors improvements including the project on the Neches and Angelina Rivers in Texas recommended by Senate Document No. 98, 76th Congress, of which the McGee Bend Dam is a part. In addition to authorizing these improvements, Congress prescribed certain specific policies and principles to be followed in the implementation of

these projects by the Federal Officers concerned. Those pertinent to this suit are found in the beginning portion of the Act and read as follows:

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> "In conformity with this policy—
>
> . . .
>
> "(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive

use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic municipal, stock water, irrigation, mining, or industrial purposes." (59 Stat. 10 *et seq.)*

The question before the Court is not whether the defendants must as a matter of constitutional necessity obtain a permit from the Texas State Board of Water Engineers for the construction of McGee Bend Dam, but whether by the Rivers and Harbors Act of 1945 Congress has in this instance voluntarily subordinated its commerce powers to the Texas regulatory scheme. The Board emphatically contends that even though Congress may have the power to pre-empt the waters of a navigable stream for the benefit of navigation, in the 1945 Act Congress made clear its intention not to do so, recognizing that in the western states the principal value of water lies in beneficial consumptive use and not in floating vessels. The above quoted language demonstrates a clear purpose to subordinate Federal uses for commerce in projects in the western states to local consumptive use, and since consumptive use of water is still in the hands of the states, this is accomplished by integrating the Federal projects into the state appropriative schemes.

No other interpretation is feasible when Congress so unequivocally declares that in the implementation of the projects "herein authorized" (including McGee Bend) the "interests and rights of the states in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control" are to be

recognized, and further that in the operation and maintenance of these projects "the use for navigation . . . of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future," in those states. As applied to McGee Bend, these provisions can only mean that before the dam is constructed the State of Texas must determine under the statutory permit procedure provided by law for that purpose that the proposed project conforms to the State program for the development, utilization and control of the waters of the Neches-Angelina watershed, and that the federal uses of water in the project, being nonconsumptive in nature, must give way to present or future consumptive uses.

The juridical setting in which the 1945 Act was passed demonstrates clearly why Congress took this course. By this language Congress sought to resolve in part the conflict which exists between the full assertion of Federal power over navigable streams and the appropriative water rights systems of the western states. The limitation of Section (b) to states lying wholly or partly west of the 98th meridian is of particular significance in this respect. This phrase consitutes the classical description of those 17 western states in the arid or semi-arid region of the United States where water is in short supply and where the uniform policy has been to promote the exploration of water resources under the appropriative system of water rights. The salient feature of any water utilization system which emphasizes consumption rather than maintenance of flow is that the efficient functioning of the sys-

tem requires that all users of the stream derive their rights from a single governmental authority. This is especially true under the appropriative system where the rights of all appropriators are closely interrelated as a result of the priority aspect of the doctrine which makes the rights of each appropriator inferior to those of each prior appropriator on the stream and superior to the rights of each who is subsequent in time.

It is obvious that under such a system chaos is produced when a water user asserts and is able to enforce a superior right to the use of the waters of the stream derived from a different source. The ability of the State to develop intelligently the resources of the watershed is seriously impaired, if not destroyed, and the use of such pre-empted water so as to cause it to waste into the sea without use for beneficial consumptive purposes would naturally cause deep resentment on the part of those affected. It was the incipient threat of such a situation resulting from the full assertion in the west of the commerce power for the benefit of navigation that gave rise to the self-restraining provisions of the Rivers and Harbors Act of 1945.

The assertion by the Federal Government of its commerce powers over navigable streams for the benefit of navigation caused little concern until in 1941 the navigable stream concept was greatly expanded in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, and it was determined in *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U. S. 508, that the full impact of the commerce clause reaches upstream to the non-navigable portions of watersheds of navigable streams. Though, as the

Court said in 1949, the Supreme Court has never held that "by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation," *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 737, by 1945 the Court had held that the Government need not compensate for destruction of riparian water rights in the exercise of the navigation easement, see e. g. *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, and the broad language employed in the *Appalachian* and *Red River* decision indicated to the 1945 western observer that even if the water could not be carried away for sale, the exercise of this navigation easement might well result in the prohibition of consumptive diversions from non-navigable tributaries to navigable streams.

As the legislative history outlined in plaintiff's briefs makes clear, when substantial rivers and harbors improvements were authorized in 1945 for the first time since before the war, the representatives in Congress from the western states insisted that navigation and flood control projects not be permitted to pre-empt state created consumptive rights in water use. This was accomplished by subjecting the Federal use of water to the appropriative systems of the western states with an express waiver in favor of consumptive uses of any proprietary right of priority obtained thereby under state law. In doing this Congress has certainly done nothing new. As Appellant has fully demonstrated in its reply brief (pp. 2-8), the Rivers and Harbors Act of 1945 and its later counterparts merely follow the water

utilization and control policy initiated by Congress many years ago in the Desert Lands Acts and continued in the Reclamation Act, the Federal Power Act and the Submerged Lands Act.

To interpret this language so as not to require that a permit be obtained from the state would render the 1945 Act meaningless. The states have established definite permit procedures specifically designed to implement their policies with respect to water resource development and use, and only through these procedures can the "interests and rights" of the states in watershed development and water utilization and control be determined.

The State of Texas, for instance, has provided in Article 7492 that an application to the Board must be made by anyone, including the United States, desiring to impound waters of a Texas stream for any of the beneficial purpose named in Articles 7470 or 7471. These include the development of hydroelectric power and the use of water for navigation. In determining whether or not such an application should be granted, the Board applies the standards provided in Article 7506 and Article 7507, which include the important question of whether the proposed use would be detrimental to the public welfare. This determination is required to be made by the State Board of Water Engineers prior to construction, and it is the only means by which the interests and rights of Texas in watershed development and water utilization and control can be protected.

In opposing this interpretation Appellees rely principally on the fact that Section (b) mentions

only navigation and not flood control. Because of the absence of the term "flood control," Appellees deny that "the Federal purpose of flood control has been subordinated to beneficial consumptive uses." (Appellees' brief, pp. 10-11, see also pp. 12-15). The plaintiff's answers to this argument are fully sufficient, but it appears to the Board that a complete answer is provided by Appellees themselves when they query "whether control of flood waters is a use of water at all." (Appellees' brief, p. 14). The answer, of course, is that *flood control is not a use of water*, and in the operation of flood control features on dams, the Government does not "use" water but seeks to dispose of unwanted water as rapidly as the downstream channel will permit. Since Section (b) is concerned with conflicts in *beneficial use*, there was no occasion for Congress to include in the section a Federal purpose which does not involve water use. No conflict such as is sought to be resolved by Section (b) could possibly occur when an appropriator diverts for beneficial consumptive use flood waters which the Government is doing its best to get rid of.

The question of whether Federal officers would be required under the 1945 Act to obtain a permit for a purely flood control structure is not before the Court. McGee Bend Dam, in addition to providing flood control benefits, will have, and is designed to have, a tremendous effect on beneficial consumptive uses of water in the Angelina-Neches watershed and for this reason Congress has chosen to require compliance with state law in its construction.

Nothing of substance could be added on behalf of the Board to plaintiff's answers to the remaining contentions of the defendants. However, any impression the Court may have received from the briefs of plaintiff or defendant that the Government is forever precluded from obtaining a permit on the McGee Bend site because of the acceptance by the State Board of Water Engineers of plaintiff's presentation should be corrected. The presentation statute, Article 7496, has no such effect. The purpose of the presentation statute is to preserve an early priority date to a prospective appropriator of large quantities of water while he pursues the detailed investigation necessary to substantiate his application for an appropriative permit. The Board remains as completely free to apply the statutory standards to the presentation holder's application as it is in any other case. It is true that the acceptance of the presentation by the Board confers proprietary interests of an inchoate nature on the prospective applicant sufficient, for instance, to afford him standing to seek judicial review of an order of the Board granting a permit on the same site to another applicant, but he has no rights which in themselves would require the issuance of the permit to him. The Government clearly is not precluded from seeking and obtaining a permit from the Board on the McGee Bend site.

It may be that the Board would consider that the Government's project for McGee Bend is preferable to that of the plaintiff, or it may be that the plans and purposes of both may be subject to full implementation, but these questions can only be deter-

only navigation and not flood control. Because of the absence of the term "flood control," Appellees deny that "the Federal purpose of flood control has been subordinated to beneficial consumptive uses." (Appellees' brief, pp. 10-11, see also pp. 12-15). The plaintiff's answers to this argument are fully sufficient, but it appears to the Board that a complete answer is provided by Appellees themselves when they query "whether control of flood waters is a use of water at all." (Appellees' brief, p. 14). The answer, of course, is that *flood control is not a use of water*, and in the operation of flood control features on dams, the Government does not "use" water but seeks to dispose of unwanted water as rapidly as the downstream channel will permit. Since Section (b) is concerned with conflicts in *beneficial use*, there was no occasion for Congress to include in the section a Federal purpose which does not involve water use. No conflict such as is sought to be resolved by Section (b) could possibly occur when an appropriator diverts for beneficial consumptive use flood waters which the Government is doing its best to get rid of.

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It may be that the Board would consider that the Government's project for McGee Bend is preferable to that of the plaintiff, or it may be that the plans and purposes of both may be subject to full implementation, but these questions can only be deter-

mined when the Board acts on an application by defendants for an appropriative permit. The 1945 Rivers and Harbors Act clearly contemplates that the defendants obtain such a permit as required by the Texas statutes, and the construction of the dam should not proceed until they have done so.

CONCLUSION

The judgment of the District Court dismissing the action should be reversed and the cause remanded for trial.

Respectfully submitted,

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